No. 9294.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

LUMBERMENS MUTUAL CASUALTY COMPANY,
a corporation,

Appellant,

vs.

MRS. LEOTIA E. McIVER, JEFF CLARK, GRACE VAUGHN,
a minor, and LORAINE JOHNSON,

Appellees.

Petition of Appellant Lumbermens Mutual Casualty Company, a Corporation, for Rehearing.

C. F. JORZ,
909 Rowan Building, Los Angeles,
Attorney for Appellant.

Parker & Baird Company, Law Printers, Los Angeles.

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To the Honorable Circuit Court of Appeals for the Ninth Circuit:

The appellant Lumbermens Mutual Casualty Company, a corporation, respectfully petitions for a rehearing of its appeal and earnestly urges a reconsideration by the Court of its decision in this case.

In urging that a rehearing be granted appellant desires to invite particular attention to what is believed are erroneous conclusions with respect to the opinion as rendered: (1) That the evidence as a whole is not open to review by the Circuit Court of Appeals and (2) That the interest

of justice does not require intervention by Your Honors as to the subject of joint control of the automobile in question.

Appellant is cognizant of the rarity of occasions in which rehearings are granted in cases of this character. It wants to be understood that in all sincerity it is not requesting a rehearing as a matter of form. In the opinion of appellant, the result arrived at by Your Honorable Court annihilates an absolutely valid and existing provision of the contract of insurance which restricts coverage when the automobile is operated in violation of the applicable license laws. The opinion as rendered sanctions and invents a course of conduct whereby the policyholder can unjustly avoid the warranties and representations upon which he entered into the contract of insurance. In the belief that a reconsideration of the opinion as rendered will convince Your Honors of the indicated danger of allowing the present opinion to remain as a precedent and its effect upon the transaction of insurance business in the entire United States, appellant is moved in the interests of substantial justice to make request for a rehearing.

I.

The Evidence as a Whole Should Be Reviewed in Order to Determine Whether the Findings of the Trial Court Are Erroneous.

The opinion as rendered states:

> "Under applicable statutes and repeated rulings here, the matter open for consideration upon the appeal was whether the findings of the trial court supported its judgment. To review the evidence was beyond the competency of the court."

This quotation was lifted from the case of *State Farm Mutual Insurance Co. v. Coughran,* 303 U. S. 485, 82 L. Ed. 970. The quoted portion reflects the rule applicable to a review of findings of a trial court prior to the adoption of the Rules of Civil Procedure. That rule required the formality of preserving in the trial court points to be urged on appeal or else the matter was not open to review.

But, with the adoption of the Rules of Civil Procedure, the formality of preserving a point was eliminated (Rule 46) and with respect to findings of fact, Rule 52 Sub. a thereof, provides:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

Upon Rule 52 quoted, appellant submits that Your Honorable Court errs in refusing to review the evidence as a whole to ascertain whether the findings in question are or are not clearly erroneous.

If a review of all the evidence is accorded, as distinguished from acceptance of the trial court's resumé of the evidence (printed opinion, pp. 2 and 3), appellant is confident that the trial court's finding that Jeff Clark (appellee) was the *sole* operator of the automobile is not supported by any evidence. This is so because when reviewed impartially it is revealed therein that the only evidence to the effect that Jeff Clark was the *sole* operator is his own opinion on the subject, viz. [R. 79], "Well, I think I was" driving the automobile.

The single physical and immutable fact that an automobile traveling 20 to 25 miles per hour, which is the admitted speed of Clark's automobile at all times in controversy here, covers from 30 to 37 feet per second, would in itself make vulnerable the conclusions drawn by the court below. It is to be recalled that Clark's vehicle was only 80 feet from the point of impact [R. 104] when his attention was first called to the fact that the brakes were not functioning by Grace Vaughn. At that point she was in full control of the automobile. At such admitted speed the automobile would traverse said 80 feet in 2½ to 3 seconds time, hardly more than two winks of the eye. Now, can it be supposed or soundly inferred that within said *2½ to 3 seconds time,* Clark from his position in the crowded front seat of the automobile could assume such a degree of complete and absolute control of the automobile to the extent of excluding any premise of control on the part of Grace Vaughn? To say yes is absolutely incredible and beyond the pale of judicial reasoning.

The only conclusion that can be logically and legally drawn from those circumstances is that under the stress of the emergency of an impending collision Jeff Clark merely assisted in the operation of the automobile and could not be and was not the sole operator of the automobile at that time.

Appellant's argument in the opening and closing briefs has been characterized as evasive in that it argued the premise that better judgment of the trial court should have dictated the rejection of Jeff Clark's testimony in favor of a finding based upon all the circumstances (printed opinion, p. 5) under the guise that the evidence was unsubstantial.

How else can the unsubstantiality of evidence be demonstrated than to point out that legal reasoning as well as logic demand the preference of inferences based upon human experience to the exclusion of those which are at best academic conclusions which fall when met face to face with physical and practical realities?

Appellant argued in the opening and closing briefs that the evidence upon which the trial court based its findings was not substantial because such evidence when considered with the evidence as a whole was self-contradictory and when viewed with the indisputable physical facts was revealed to be a pretence and not real.

Under such circumstances, it cannot be questioned but that a finding so based would be clearly erroneous.

Such a finding would not be conclusive on an appeal because it is based upon evidence in conflict with the undisputed physical facts and thus be inherently improbable.

In *Hughes v. Atchison etc. Ry. Co.*, 121 Cal. App. 271, the rule with respect to the position that evidence inherently improbable assumes was stated thusly (p. 278):

> "And, in this respect, the rule is settled that, while a finding or verdict will not be disturbed on appeal if there is a substantial conflict in the evidence, 'the evidence, in order to raise a conflict, must be such as to present a fair and reasonable ground for a difference of opinion.' (Citing cases.) As we understand the rule of these cases it is this: Before the finding is conclusive on appeal the conflict in the evidence must be substantial and real, and not merely fanciful; it must be of such a character that reasonable minds, viewing it dispassionately, might fairly entertain a difference of opinion upon it."

Likewise, in *Neilson v. Houle*, 200 Cal. 726, it was stated (p. 729):

> "Undoubtedly an appellate court, in reviewing the evidence, is bound to exercise its intelligence, and in doing so must recognize that certain facts are controlled by immutable physical laws. It cannot permit the verdict of a jury to change such facts, because, as said in Quigley v. Naughton, 100 App. Div. 476 (91 N. Y. Supp. 491), to do so would, in effect, destroy the intelligence of the court. And when the

> undisputed circumstances show that the story told by litigant and his witnesses cannot by any possibility be true, or when their testimony is inherently impossible, the appellate court should not hesitate to reverse the judgment, to the end that the cause again may be submitted to the determination of a jury or trial judge."

And, in *Wade v. Thorsen,* 5 Cal. App. (2d) 706, at page 712, it was stated:

> "Without a doubt innumerable cases support the proposition of law that a reviewing court will set aside the finding of a trial court, on the verdict of a jury, when such finding or verdict is based either upon evidence inherently improbable or when there is a physical impossibility of the evidence being true."

To summarize this point appellant submits that it is entitled to a review of the evidence in the light of determining whether the findings are erroneous. Under the opinion as rendered this review has been denied appellant by Your Honors. Substantial justice would best be served by a consideration of the evidence as a whole as contrasted to reviewing on that which the trial court deems sufficient to support its findings in question. In no other way, viz., a review of the evidence as a whole, can the erroneousness of findings be determined.

II.

The Interest of Justice Does Require Intervention by Your Honors as to the Subject of Joint Control of the Automobile in Question.

Your Honors intimate, as did the court below, that if the complaint had alleged joint operation the case of *State Farm Insurance Co. v. Coughlin,* 303 U. S. 485, 82 L. Ed. 970, would assume more than passing interest in the result of this litigation. It is likewise stated that the point is raised for the first time on appeal.

In this respect appellant submits that Your Honors err because appellant is not injecting a new issue not urged below.

Appellant contended in the opening and closing briefs that under all the evidence the premise of joint control was before the court since in any view of the evidence the only conclusion that could be drawn therefrom was either sole operation by Grace Vaughn or at least joint operation by both Grace Vaughn and Jeff Clark.

It was further demonstrated that the judgment was not sustainable because under either of these views the policy was ineffective.

The trial court refused to consider the issue of joint control because it was not alleged in precise language. The trial court did recognize, however, that from all evidence available to appellant at the time the complaint was drafted Grace Vaughn was alone operating the automobile and it was not until the day of trial that Jeff Clark repudiated his original narration of the accident. [See opinion of trial court, R. 147.]

Even, in face of the lack of an affirmative amendment it was shown such issue was before the court under the

applicable rules since it was tried without objection and the issue was by consent of all parties within the case. Such being the status of the evidence the trial court could not penalize the appellant based upon its failure to observe a technical rule of pleading when all the circumstances and substantial justice demand consideration of the issue of joint control.

If consideration of the issue of joint control would change the result of the litigation then in all justice to both parties Your Honors should interest yourselves in such an issue. The opinion as rendered denies appellant such attention and in this respect Your Honors err because there exists every reason to inspect the evidence to determine whether the trial court below has erroneously failed to consider such issue when it is required that such an issue should be considered.

Appellant does not feel that Your Honors would allow a technical rule of procedure to obstruct substantial justice. Nor would Your Honors blind yourselves to the actual circumstances. Your tribunal is to supervise the justice dispensed below and when error plainly appears it is the duty of your court to correct such error regardless of its form especially when substantial justice would be defeated if the error were uncorrected.

The *State Farm* case cannot be logically explained away from application to the facts at bar. The factual parallel between the two cases is outstanding.

It is to be remembered that in the *State Farm* case, up to the second that Mrs. Anthony grabbed the steering wheel the unlicensed minor was in full control of all the driving apparatus of the automobile. In the case at bar up to 2½ to 3 seconds prior to the impact the unlicensed

minor (Grace Vaughn) was admittedly in full control of all the driving apparatus of the automobile. The peril of an impending collision prompted Mrs. Anthony to grab the steering wheel of the automobile. Whereas, the failure of brakes and an impending collision prompted Jeff Clark to grab the steering wheel of the automobile. And, the *only* difference, if it can be so called, between the conduct of Mrs. Anthony and Jeff Clark, is that while both were laboring under excitement of an accident Jeff Clark did one additional thing, to-wit, reached for the emergency brake lever.

This *single fact,* to-wit, applying the emergency brake, is all that the trial court uses to avoid application of the Supreme Court's adjudication and it is only this single factor to prevent Your Honors from giving full effect to the holding in the *State Farm* case to the case at bar.

It is logical to suppose that if the findings in the *State Farm* case had included the factual element that Mrs. Anthony had reached for the emergency brake that the Supreme Court in its opinion would have concluded that Mrs. Anthony had solely operated the automobile?

The answer is unquestionably—no. It takes more than the mere application of brakes and manipulation of the steering mechanism to operate an automobile.

The striking analogy of facts existing between the two cases is the basis of our contention that the case at bar is controlled by the *State Farm* case. The examination of the opinion made in the opening and closing briefs in our case was done to point out that under no

legal circumstances could the trial court take a view of the evidence contrary to the holding of said case and that its attempt to do so constituted a departure from established judicial principles since to do so the trial court had to ignore uncontradictable physical facts.

Those physical facts being the construction of the automobile, and the undisputed activities attendant upon operating the driving of an automobile which when considered and analysed with the admissions and oral testimony of the witnesses limited the opinion of Jeff Clark that he alone was driving at the time of accident. Such physical facts prescribed the field of inferences which might be deducible from the oral testimony and made it legally as well as physically impossible for the trial court to draw inferences opposed to such physical facts.

Conclusion.

Appelant in all earnestness requests a reconsideration of your opinion as rendered.

In the case at bar there does not exist a factual conflict between various witnesses relating conflicting views. Here the facts are undisputed. The only dispute lies in the process by which an inference is drawn. In short, the trial court refuses to draw an inference which should in all good conscience be drawn. The trial court has attempted to distinguish the case at bar from the applicability of the decision in the *State Farm* case and in doing so has closed its eyes to pertinent and relevant testimony pertaining to the fact that Grace Vaughn did

and was activating some of the driving devices prior to and at the time of the accident and evidence pertaining to the operation of an automobile which because of the very nature thereof precluded Jeff Clark from being the sole operator of the automobile, as that term is understood in the policy and in general usage.

The policy provision in question is a standard provision found in all automobile liability policies issued in the entire United States. It seeks to establish a uniform criterion for determining when coverage will or will not be extended. As the case now stands, the opinion as rendered creates a precedent which destroys that uniformity and when that particular provision is ever litigated the outcome will depend on the degree of control which the adult occupant thinks he exercised and not upon what the actual facts disclose. The trial court's opinion has shown the way to avoid an adjudication of the Supreme Court and all that adult occupants are required to do in order to avoid the policy provision is to do something more than merely grab the steering wheel of an automobile when said automobile is being operated by an unlicensed minor.

Appellant realizes that Your Honorable Court burdened with numerous appeals cannot attempt to single out the case at bar and prefer it in importance to the many other litigated matters and that the argument could be made that insurance carriers in the United States can change their policy terms to meet the exigencies created by the precedent at bar. In this respect appellant seeks no sympathy and asks for none and is entitled to none. It does ask

that uniformity be preserved and that Your Honors in the interest of substantial justice prevent any attempt to circumvent the plain ordinary language in a contract of insurance and apply to the facts at hand the same judgment that is accorded all litigants in the same circumstances. If the result of this controversy turns on joint control, justice requires that the case be returned to the trial court and be thus litigated.

Respectfully submitted,

C. F. Jorz,

Attorney for Appellant.

Certificate of Counsel.

I, C. F. Jorz, counsel for the above named appellant, do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not interposed for the purposes of delay.

C. F. Jorz.